STATE PERSONNEL BOARD, STATE OF COLORADO
Case No. **2004B143**

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE, ON REMAND

PATRICK WARD,

Complainant,

vs.

DEPARTMENT OF NATURAL RESOURCES,

Respondent.

Administrative Law Judge Mary S. McClatchey held the hearing in this matter on October 25 and 26 and November 15 and 16, 2005, at the offices of the State Personnel Board, 633 17th Street, Suite 1320, Denver, Colorado. The record remained open until December 19, 2005. Complainant was represented by Patricia Cookson, Esquire. Respondent was represented by Assistant Attorney General Christopher Puckett.

On June 22, 2006, the Board remanded this case to the ALJ "solely for legal analysis regarding the fifth prong of the test for a *prima facie* case of discrimination based on a disability, as enunciated in *Community Hospital v. Fail*, 969 P.2d 667 (Colo. 1998)." Additional Findings of Fact and Discussion appear below in bold face.

MATTER APPEALED

Complainant, Patrick Ward ("Complainant" or "Ward") appeals his administrative termination by the Department of Natural Resources, Division of Wildlife ("Respondent" or "DNR").

For the reasons set forth below, Respondent's action is **rescinded.**

ISSUES

1. Whether Respondent's action of administratively terminating Complainant was arbitrary, capricious or contrary to rule or law;

2. Whether Respondent discriminated against Complainant on the basis of disability;

3. Whether Complainant is entitled to an award of attorney fees and costs.

FINDINGS OF FACT

General Background

1. Complainant commenced employment on June 1, 1992 at DNR as a Wildlife Technician I at the Rifle Falls Fish Hatchery ("the Hatchery") in Rifle, Colorado. Complainant and the other Wildlife Technician I's were soon reallocated to Technician III's.

2. Mr. Ward held the same position at the Hatchery until the time of his administrative termination on March 29, 2004.

3. The Hatchery in Rifle is the largest in the state hatchery system. It is a 550-acre facility with twelve buildings, open 365 days a year.

4. The Hatchery employs six Wildlife Technician III's, one Wildlife Technician IV (assistant manager), and one Wildlife Technician V (Hatchery manager).

5. All Hatchery employees, including the supervisors, reside on the Hatchery property, and must be available to perform emergency tasks on an as-needed basis. They are all Fair Labor Standards Act exempt.

The Work at the Hatchery

6. The state hatchery system raises trout for release into the lakes and rivers of Colorado. Because the Hatchery deals with a live product, it is crucial that the fish are fed several times a day and that minimal stress is placed on them when moving, feeding, and cleaning them. This requires that employees act quickly and efficiently when placing fish under stress.

7. The Hatchery personnel perform several different functions. The bulk of the Wildlife Technician III work involves the following:

- "The production of 5 million trout by anticipating and manipulating the rearing environment to include: nutrition and feeding, picking eggs, counting, sorting, weighing, grading, spawning, hatching eggs, cleaning and disinfection of rearing areas, and precise record keeping." (Position Description Questionnaire);

- Shipping and distributing over 5 million live trout statewide by sustaining an artificial environment in the transport tanks and analyzing and testing receiving waters for acceptability of fish;

- Driving and operating two to fifteen ton trucks, requiring a Colorado Commercial Drivers License;

- Performing water quality tests; monitoring water samples; performing lab work on water and fish to identify disease organisms, etc.;

- Inspection and operation of vehicles and equipment on the Hatchery grounds, including snowplows, dump trucks, forklifts, hydraulic cranes, backhoes, bulldozers, tractors, pond cleaners, welders, power tools, pumps, generators, and solar feeders;

- Repair and maintenance of all equipment on campus;

- Supervision of volunteers and inmates.

8. The Hatchery has three enormous buildings which house the fish. The "hatchery building" houses the smallest fish; the nurse basins house fish at the next stage of development; and the raceways house the biggest fish, prior to release to their destinations throughout the state

9. The work in the hatchery building, feeding and cleaning the long, narrow basins of fish, is the lightest duty work.

10. The work in the nurse basins and raceways is far heavier work. For example, the raceway fish are fed with a blower truck, or auger, which sprays the fish feed into the fish pools. The truck holds twenty or more bags of feed, each weighing 50 pounds. To load the auger, one must place the 50-pound sacks of fish feed onto a forklift pallet, raise it up, and then push the sacks into the open basin in the auger.

11. All Hatchery employees work a full weekend, performing all job duties at the Hatchery, every seventh weekend. This weekend duty includes all feeding and cleaning necessary in the hatchery building, nurse basins, and raceways.

12. The PDQ for Complainant's Wildlife Technician III position lists all duties as "essential functions." It divides the duties into levels of physical demand as follows:

- 25% of the job duties and responsibilities require Medium Physical Demands (exertion of up to 50lbs. of force occasionally, and/or up to 20lbs. of force frequently, and/or up to 10 lbs. of force constantly to move objects);

- 65% of the job duties and responsibilities require Heavy Physical Demands (exertion of up to 100 lbs. of force occasionally, and/or up to 50 lbs. of force frequently, and/or up to 20 lbs. of force constantly to move objects); and

- 10% of the job duties and responsibilities requires Very Heavy Physical Demands (exertion in excess of 100lbs. of force occasionally, and/or in excess of 50 lbs. of force frequently, and/or in excess of 20 lbs. of force constantly to move objects).

Assignment of Duties

13. At all times relevant to this appeal, David Capwell was the Hatchery Manager, Wildlife Technician V, and Dawn Kelley was the Assistant Hatchery Manager, Wildlife Technician IV. Mr. Capwell was Complainant's appointing authority.

14. Capwell assigned duties to the Hatchery employees at a meeting held at the beginning of each day.

15. Historically, the work group of six Wildlife Technician III Hatchery employees have shared duties on a relatively equal basis. There is tremendous variety in the tasks necessary to operate the Hatchery. The work group of six employees rely on each other in assuring all tasks are performed.

16. There have been exceptions to the equal sharing of duties. Mr. Capwell's predecessor assigned a Wildlife Tech III, Cindy Reagan, to the hatchery building for a six-year period, from 1992 to 1998, roughly 85% of the time. Reagan performed research in this position, enjoyed the assignment, and no one objected to the arrangement. This assignment was an aberration from the normal division of labor.

17. In late 2001, Capwell assigned another former employee, Allison Van Wyk, to do nothing but feeding and cleaning of the fish in the hatchery, nurse basins, and raceways, for a period of several months. This too was unusual.

18. Employees injured on the job have historically been permitted to work light duty assignments, which typically consists of the hatchery building feeding and cleaning, some lab work, office work, net repair, and other miscellaneous tasks.

Complainant's Injury

19. On August 7, 2001, Complainant was injured in an on-the-job accident after performing duties in the hatchery building.

20. Mr. Ward's treating physician immediately placed him on work restrictions. Mr. Ward remained on temporary work restrictions, on a sporadic basis, throughout the duration of employment. In late November 2001, he was release to work and to "use caution with any lifting."

21. Most temporary work restriction orders from Complainant's physician were for

a period of one month in duration. They usually included lifting/pushing/pulling restrictions, of either 10 or 20 pounds.

22. When Mr. Ward received a new set of work restrictions from his doctor, he handed them to Mr. Capwell. Mr. Capwell often permitted Mr. Ward to perform primarily light duty assignments, which included working in the hatchery building, in the office, in the lab, and in the isolation unit.

23. Mr. Capwell informed Mr. Ward that there were ways to get around work restrictions. He periodically assigned Mr. Ward to perform tasks that exceeded his work restrictions. When this occurred, Mr. Ward would often perform the duties anyway, for fear of losing his job. At other times, Mr. Ward reminded Mr. Capwell of his restrictions, and Mr. Capwell would give Mr. Ward a different, less physically demanding task to perform.

24. Ms. Kelley was the Hatchery supervisor in Mr. Capwell's absence. She did not review any of Mr. Ward's work restrictions. If she was responsible for assigning work to the Hatchery crew, she asked Mr. Ward if he could perform a duty within his restrictions, and expected him to inform her whether he could or could not perform that duty.

25. Complainant periodically re-injured himself and had to stop reporting to work. This was due in part to his working beyond his restrictions. On two separate occasions, he lifted heavy objects over his head, causing re-injury.

26. During the periods Complainant was released to work without any temporary restrictions, he often had to take one day off a week due to the pain in his back.

27. Complainant's condition did not improve over time.

28. On February 10, 2003, Complainant's physician placed him at Maximum Medical Improvement for his back injury, at a 22% Permanent, Partial Impairment rating. It was noted he had chronic low back pain with intermittent lumbar radiculopathic symptoms. At that time, he was working without restrictions, but was taking regular days off from work due to back pain.

May 2003 Letter Regarding Disability and Request for Accommodation

29. On May 3, 2003, Complainant sent a letter to the "Personnel Manager" at DNR, who at that time was Butch Friend. He copied Mr. Capwell on the letter.

30. Melinda Elswick was the Americans with Disabilities Act ("ADA") Coordinator for DNR and its Risk Manager. She handled the letter. She has served as ADA Coordinator since 1999.

31. Ms. Elswick has worked in the Human Resources Department at DNR since 1990. She is responsible for Department compliance with the ADA, the Family Medical

Leave Act, and Workers Compensation laws.

32. Ms. Elswick has been fully trained and certified in State Personnel Board rules.

33. Complainant's letter stated in part, "Because of an on-the-job injury, which resulted in a permanent, partial, disability; I am requesting reassignment to a position that is less physical demanding (sic)." Complainant notes, "In spite of medications, physical therapy, etc., my condition never improved. I miss several days of work each month because of intense pain, which results from the physical exertion required to do my job. The day after loading or moving large numbers of fish, cleaning raceways or making long fish distribution trips, I quite often find myself unable to get out of bed due to the extreme neck, back and leg pains."

34. In his letter, Mr. Ward reviewed his employment history at DNR and DOC and noted that he has a bachelor's degree in biology.

35. Mr. Ward also stated, "For the time being, I can perform my job at the Rifle Hatchery if assigned to work the hatchery building and isolation unit. I can also make distribution trips of short duration that do not aggravate my back injury."

36. Elswick was aware of Complainant's situation, as she had assisted him with the processing of his Workers Compensation claim. Elswick drafted the response to Ward's May 3 letter, which was signed and sent by Butch Friend on May 13, 2003. The letter states in part,

> "Thank you for your letter requesting job reassignment. We are willing to search for other positions on your behalf, as described in our published policy on Return to Work/Modified Duty (copy enclosed). That policy describes how we will compare the physical requirements of any vacant positions we have available, to the permanent restrictions placed on you by your doctor."

37. The letter informed Ward that DNR would have to put off the job search until he submitted the Fitness-to-Return form, documenting his permanent restrictions.

38. Ward immediately arranged to have a functional capacity evaluation. It took several months to schedule it, which is customary.

39. In late May 2003, Mr. Capwell stated to Mr. Ward that if he couldn't handle the job, he would have to move on down the road and get out of there, or words to that effect.

Complainant's Second Request for Reassignment or Job Restructuring

40. After completion of the functional capacity evaluation, on September 15, 2003, Ward's physician issued a Fitness to Return Certification listing Complainant's permanent restrictions, based on the results of that evaluation. The restrictions include no lifting, carrying, pushing, or pulling objects over 20 pounds, among others. (See section below.)

41. On September 24, 2003, Complainant sent the September 15, 2003 Fitness-to-Return Certification and list of permanent work restrictions to HR Director Friend. Ward referenced his May 3, 2003 letter and reiterated his request for reassignment to a vacant position or restructuring of his current position.

42. In the September 24 letter, Mr. Ward notes that Dr. Heil "had determined that I have physical limitations which will not allow me to do my present job, as it is now structured." He continues, "I am requesting a reassignment to a job with comparable pay, or a restructuring of my job duties at the Rifle Unit. Because of my varied background I believe I can still contribute greatly to the mission of the Department of Natural Resources. I have worked on ranches and farms, as a Park Aid for the U.S. Army Corps of Engineers, a Park Aid for Colorado State Parks, four national Fish Hatcheries for the U.S. Fish and Wildlife Service." He recites his 11 years at the Hatchery, and additional work for the Division of Wildlife and the Department of Corrections.

43. With regard to restructuring his current position, Mr. Ward stated, "If no other job is available, my present job duties could be restructured to meet my physical needs. My permanent duties could be working the hatchery building and isolation unit, conducting water chemistry, supervising inmates and summer volunteers, and other jobs that do not exceed my physical limitations. . . Hopefully something that is mutually beneficial to both me and the Department of Natural Resources can be worked out."

DNR Return to Work/Modified Duty Policy

44. Ms. Elswick, the ADA Coordinator, authored the Modified Duty Policy in 1999. The policy is divided into two sections: one for employees under temporary restrictions, and one for employees under permanent restrictions.

45. For employees that have reached MMI and have permanent physical restrictions, the policy provides the following framework:

- "The supervisor should follow this process while working closely with the Human Resources Office and the DNR ADA Coordinator."

- Examine the PDQ for the employee's position. Are the duties accurately described? If not, rewrite the PDQ to describe the tasks that must be accomplished by this position. . . .

- Do any of the tasks have physical requirements that exceed the employee's permanent restrictions? If not, return the employee to normal duty.

- If yes: Are these duties essential functions? (Essential functions are marked on the PDQ.) If not, remove these 'marginal' duties from the PDQ. Employee continues in the same job, performing the essential functions.

- If yes: Can these essential functions be perfomed with a reasonable accommodation? If yes, make the reasonable accommodation and return the employee to the same position.

- If the employee can no longer perform the essential functions of the job, even with a reasonable accommodation, the employee may be protected by the Americans with Disabilities Act (ADA). All decisions should be discussed with and coordinated by the DNR Human Resources office and the DNR ADA Coordinator.

- The Human Resources Office will make a search for vacant positions within the Department, for which the employee is qualified, and which do not exceed the employee's permanent restrictions. . . The employee will be offered an opportunity to transfer/demote to any available positions found. If no positions are found, or if the employee refuses transfer/demotion, the remaining options are:

- 1. The employee may apply for a disability requirement (sic) [retirement] with PERA; 2. the employee may apply for Short Term Disability and Long Term Disability, 3. if ineligible, the employee may resign, and 4. the department may administratively separate the employee, pursuant to the Personnel Rules and Procedures."

Complainant's Permanent Restrictions

46. Complainant's September 15, 2003 Fitness to Return Certification, **signed by Dr. Heil**, listed his permanent restrictions as follows:

a. No lifting or carrying objects over 20 pounds. Repetitions occasionally.
b. No pushing or pulling objects over 20 pound. Repetitions occasionally.
c. No bending/stooping/squatting/twisting: Repetitions rarely.
d. No kneeling for more than 1 hour per day.
e. No crawling for more than 1 hour each day.
f. No sitting for more than 1 ½ hours each day.
g. "7/8 hrs no driving," which apparently means driving no more than one hour per day.
h. No standing for more than 5 hours per day.
i. No walking for more than 15 minutes each day, "4/8 hours."

j. No climbing stairs.
k. No working or climbing on elevated equipment, such as ladders.
l. No reaching above the head or shoulders.
m. No reaching away from the body greater than 24 inches, with either arm.
n. No assaultive or potentially assaultive situations and/or takedowns or arrests.
o. No driving a vehicle.
p. No operating machinery or equipment.
q. No lifting below knee high or overhead.

47. On October 27, 2003, Complainant's treating physician, Dr. Heil, completed a second document pertaining to Complainant's physical restrictions, the Standard Insurance Company State of Colorado Disability Claim Attending Physician's Statement. The Physical Capacities section listed Complainant's restrictions as follows: "Based on the patient's physical limitations and restrictions, he/she can: Frequently lift 20 pounds; Maximum lift 20 pounds; Walk/Stand at one time (in hours): 15 minutes; Walk/Stand in an 8-hour work day: 4 – 8 hours; Sit at one time (in hours): 2 – 1 hour; Sit in an 8-hour day: [no restriction is given]; Bend/Stoop: Occasionally. See attached limitations." (Emphasis added.)

48. This document certifies that Complainant has no restrictions on sitting during an 8-hour work day, but would need a break from sitting after one or two hour periods of sitting on the job.

49. The September 15, 2003 Fitness to Return Certification was attached to this October 27, 2003 Physician's Statement. The same doctor completed both forms summarizing Complainant's physical restrictions.

50. Complainant provided the October 27, 2003 Physician's Statement to Respondent.

51. Complainant cannot perform the nurse basin and raceway tasks under his permanent restrictions.

52. Complainant can perform some hatchery building tasks under his permanent restrictions. However, he is unable to transport the fish feed from the storage area to the basins. Complainant testified he would have inmates perform this task. In addition, Complainant would have to exceed his walking restriction in order to make the number of trips necessary to feed the fish within his lifting and carrying restrictions.

53. Complainant is unable to perform most of the Hatchery weekend duties under his permanent restrictions.

54. Complainant can perform office work, isolation unit work, water chemistry work in the lab, net repair work, and supervisory work relating to inmates and summer

volunteers, under his permanent restrictions.

55. Complainant can perform office work and administrative duties; he is a proficient typist; he can use Word Perfect and Microsoft Word. He has a four-year degree in Biology.

September 2003 through March 2004

56. Upon receipt of Complainant's September 24, 2003 accommodation request, Ms. Elswick did not inform Mr. Ward that she was the ADA Coordinator for DNR. No one at DNR informed Mr. Ward that Ms. Elswick was the ADA Coordinator for DNR. Mr. Capwell was unaware that Ms. Elswick was the ADA Coordinator for DNR until a year after Complainant's termination.

57. Mr. Capwell has never seen and is untrained in the Return to Work/Modified Duty policy.

58. Ms. Elswick reviewed Ward's September 24 request for accommodation with Friend and Capwell. Elswick and Capwell reviewed Complainant's PDQ and determined that Complainant was unable to perform the essential functions of the Wildlife Technician III position, with or without reasonable accommodations. They decided that DNR would not restructure Complainant's job.

59. Elswick and Capwell did not include Mr. Ward in their discussions or decision-making process regarding his request to restructure his position. They had no contact with him about it.

Vacant Jobs at DNR September 2003 through February 2004

60. Respondent's May 13, 2003 letter and its Return to Work policy caused Complainant to rely on Respondent to advise him of the existence of any and all vacant positions at DNR for which he was qualified. In the May 13 letter, Respondent's Human Resources Director committed to Complainant that the Human Resources office would "search for other positions on your behalf, as described in our published policy on Return to Work/Modified Duty (copy enclosed)." The Return to Work policy required Respondent's Human Resources Office to "make a search for vacant positions within the Department, for which the employee is qualified, and which do not exceed the employee's permanent restrictions."

61. The Human Resources Office at DNR did not conduct a vacant job search upon receipt of Ward's Fitness-to-Return Certification form on September 24, 2003.

62. No one at DNR responded to Complainant regarding his request for

reassignment to a vacant position.

63. DNR has approximately 1500 certified employees.

64. Complainant was not considered as a candidate for any and all vacant positions at DNR for which Complainant was qualified, during the period September 24, 2003 through February 2004.

65. In March 2004, at the time it terminated Complainant, Respondent conducted a vacant job search for Complainant. Respondent used a recent resume of Complainant to fill out the Qualifications section, and did not consult with Complainant to assure the Qualifications section was accurate or complete. Respondent did not inform Complainant it was performing a vacant job search for him.

66. The March 2004 Job Search document lists Complainant's sitting restriction as "no sitting for more than 1 ½ hours each day." The October 27, 2003 Attending Physician's Statement certifies that Complainant has no sitting restriction during an 8-hour day, but mandates a break from sitting after one or two hour periods of sitting on the job.

67. The March 2004 Job Search document does no list Complainant's computer and administrative experience and skills under, Qualifications.

68. The March 2004 Job Search document contained a list of ten vacant positions at DNR. Without consulting Complainant or his treating physician, Respondent unilaterally determined that Complainant could not perform any of those jobs.

69. Respondent has never given Complainant any information concerning the jobs identified, minimum qualifications, etc. (except in the context of this hearing).

70. The first time Complainant saw the March 2004 Job Search document pertaining to him was after he appealed his termination.

71. No one at DNR discussed or had any contact with Complainant concerning whether he was entitled to the protection of the ADA, whether he was disabled under the ADA, whether a reasonable accommodation could be offered to him, or whether such an accommodation would pose an undue hardship on DNR.

Pre-Termination Letter

72. Complainant's last day of work was October 1, 2003.

73. During the period October 2, 2003 through the end of Complainant's employment, Elswick assisted Complainant in the processing of all available leave. She assisted Complainant in processing the paperwork for his receipt of FMLA, short-term, and long-term disability benefits.

74. Complainant exhausted all available leave on March 29, 2004. (Stipulated Fact)

75. On March 16, 2004, Elswick drafted a pre-termination letter to Complainant, for Richard Kolecki's signature. Kolecki was the recently-appointed Chief of Fish Hatcheries for the State of Colorado. Mr. Kolecki relied on Ms. Elswick to draft the letter appropriately.

76. The March 16 letter advised Complainant, "Procedure P5-10 provides that when an employee has expended all paid leave and is unable to return to work and family/medical leave and/or short-term disability leave is inapplicable, the appointing authority may administratively separate the employee."

77. Procedure P-5-10 actually states in relevant part, "No employee may be administratively discharged if FML and/or short-term disability leave apply and/or if the employee is a qualified individual with a disability who can reasonably be accommodated without undue hardship."

78. Ms. Elswick, DNR's ADA Coordinator, omitted the reference to qualified individuals with a disability who can reasonably be accommodated without undue hardship, in her explanation of Procedure P-5-10 to Complainant. As ADA Coordinator and Acting HR Director for DNR, it was Ms. Elswick's responsibility to accurately inform Complainant of his and the agency's rights and responsibilities under the ADA, Procedure P-5-10, and DNR's Modified Duty policy.

79. Elswick's May 16 letter to Complainant misrepresented Procedure P-5-10 by omitting the reference to the ADA standards that applied.

80. The March 16 letter advised Complainant that his unpaid leave would expire on March 28, that his paid leave would expire on March 29, and requested that he advise DNR no later than March 28 on his "plans to return to work." The letter further noted, "Before you can return to work, you will need to provide us with a 'Fitness-to-Return Certification' form which is enclosed."

81. On March 18, 2004, Complainant responded to the March 16 letter drafted by Elswick and signed by Mr. Kolecki. In his letter, he noted that he had made requests for accommodations in three previous letters, attached, and that there had "not been even the slightest effort to accommodate my physical limitations or reassign me to a job that I can handle." He noted that other co-workers had been accommodated by being reassigned "to just work the hatchery and it wasn't viewed as unfair to the rest of us."

82. Mr. Ward further noted, "During this period, the only information that I have received from anyone concerning my injury, benefits and rights are what I got from making phone calls to Mindy Elswick. It certainly doesn't appear that anyone was concerned with my welfare or future with the DOW. Most organizations make an attempt to retain experienced employees, rather than spend the time and money training new ones. My impression is that employees in the DOW [Division of Wildlife] are expendable items." He reiterated his qualifications to perform other work for DNR, and stated that his plan to return to work was "as soon as possible."

83. Kolecki and Elswick received this letter. Neither responded to Complainant. Neither made an effort to contact Complainant.

Termination of Complainant

84. On March 29, 2004, Respondent sent a letter to Complainant terminating his employment. Elswick drafted the letter, and Mr. Kolecki signed it. The letter noted that Complainant had exhausted all available leave, and further stated in part,

> "You have requested work accommodation for your disability. In accordance with our Modified Duty/Return to Work Policy, we first determined that your present position cannot be modified to meet your restrictions, without removing essential functions. We next made a search for vacant positions at or below your current level, with physical requirements within your restrictions, for which you are qualified. We used the most recent restrictions provided by your doctor in September 2003, and based the assessment of your qualifications on your most recent application, from February 2004, and were unable to identify any positions for which you are qualified, which fall within your physical restrictions."

85. The termination letter was the first and only communication to Complainant by Respondent concerning its job search for vacant positions. That job search was conducted within a week of Complainant's termination, using information from a February 2004 job application.

86. The termination letter advised Complainant that if he recovered from his injury in the next year, he would be placed on the reemployment list and considered for the next vacancy in the Technician III class.

Alison Van Wyk, Similarly Situated Employee

87. In early 2002, Alison Van Wyk, a Wildlife Technician III, developed a rash on her body. In an attempt to ascertain whether the rash was caused by fish food, her physician placed her on modified duty, not to work near fish food. The work restriction was

for six weeks. Van Wyk was out of state on business for the first three weeks. Upon her return, Mr. Capwell refused to adhere to the restriction, and assigned her to feed fish.

88. When Ms. Van Wyk explained that her restriction was temporary, solely to determine whether she had an allergy, Mr. Capwell informed her she had three options: quit; be fired; or resign for medical reasons. When Ms. Van Wyk called the Human Resources office, she received no guidance or assistance. After leaving DNR, she filed a claim with the Colorado Civil Rights Commission. DNR later settled the case out of court.

89. In a March 21, 2003 email to a subordinate, Ms. Elswick stated regarding Mr. Ward's case, "Depending on his permanent restrictions, it means another messy case for me at Rifle Hatchery, though. (Home of such fun cases as Richard Wolfe and Alison Van Wyk)."

DISCUSSION

I. GENERAL

Certified state employees have a property interest in their positions. Colo. Const. Art. 12, §§ 13-15; §§ 24-50-101, *et seq.*, C.R.S.; *Department of Institutions v. Kinchen*, 886 P.2d 700 (Colo. 1994). In this appeal of Complainant's administrative termination, the Complainant has the burden to prove by preponderant evidence that his termination was arbitrary, capricious or contrary to rule or law. *Velasquez v. Dept of Higher Education*, 93 P.3d 540, 542 (Colo.App. 2003); § 24-50-103(6), C.R.S.

II. HEARING ISSUES

A. Respondent discriminated against Complainant on the basis of his disability.

Complainant contends that he was terminated on the basis of disability in violation of the Colorado Anti-Discrimination Act, section 24-34-402, C.R.S. ("the Act").

Under the Act,

> "It shall be a discriminatory or unfair employment practice: (a) For an employer . . . to discharge . . . any person otherwise qualified because of disability . . . but, with regard to a disability, it is not a discriminatory practice for an employer to act as provided in this paragraph (a) if there is no reasonable accommodation that the employer can make with regard to the disability, the disability actually disqualifies the person from the job, and the disability has a significant impact on the job." Section 24-34-402(1), C.R.S.

The Colorado Civil Rights Commission ("the Commission") has promulgated rules to implement the Act, in which it interprets the Act as being "substantially equivalent to

Federal law, as set forth in the Americans with Disabilities Act," 42 U.S.C. Sections 12101 - 12117 (1994). Commission Rule 60.1, Section B, 3 Code Colo. Reg. 708-1. Therefore, interpretations of the state Act "shall follow the interpretations established in Federal regulations adopted to implement the [ADA] . . . and such interpretations shall be given weight and found to be persuasive in any administrative proceedings." *Id.* Further, Board Rule R-9-4 provides, "Standards and guidelines adopted by the Colorado Civil rights Commission and/or the federal government, as well as Colorado and federal case law, should be referenced in determining if discrimination has occurred."

The ADA prohibits discrimination against qualified individuals with a disability because of the disability of such individual. To establish a prima facie case of discrimination under the ADA, an employee must show: (1) he is disabled within the meaning of the act; (2) he is qualified, with or without reasonable accommodation, to perform the essential functions of the job held or desired; and (3) he was discriminated against because of his disability. *Mason v. Avaya Communications, Inc.*, 357 F.2d 1114, 1118 (10th Cir. 2004).

i. Complainant is disabled within the meaning of the Act.

Disability under the Act "means a physical impairment which substantially limits one or more of a person's major life activities and includes a record of such an impairment and being regarded as having such an impairment." Section 24-34-301(2.5)(a), C.R.S. "Major life activities" "means functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working." 29 CFR §1630.2(i). "Substantially limits" means either "unable to perform a major life activity that the average person in the general population can perform" or "significantly restricted as to the condition, manner, or duration under which an individual can perform a particular major life activity as compared to the condition, manner, or duration under which the average person in the general population can perform that same major life activity." 29 CFR, §1630.2(j).

Complainant has a physical impairment which substantially limits one or more of his major life activities. He is permanently restricted in the manner and duration of performing manual tasks including lifting, pushing, pulling, and reaching above his head or shoulders.

Respondent contends that Complainant is not disabled, because his restrictions are not permanent. Respondent cites Complainant's testimony at hearing about returning to work, suggesting that Complainant testified that whatever physical problems existed in 2003 no longer exist today. Complainant did not so testify. He consistently asserted that with appropriate accommodations he could perform the Wildlife Technician III position.

ii. Respondent violated its duty to reasonably accommodate Complainant's disability in two ways: first, by failing to engage in the interactive process, and second, by failing to timely conduct a vacant job search.

Employers subject to the ADA "shall make reasonable accommodation to the known

physical limitations of an otherwise qualified disabled applicant or employee unless the [employer] can demonstrate the accommodation would pose an undue hardship or that it would require any additional expense that would not otherwise be incurred." CCRC Rule 60.2(C)(1). Discrimination under the ADA includes "not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability. *Mason v. Avaya Communications, Inc.*, 357 F.3d 1114, 1118 (10th Cir. 2004). An individual is "otherwise qualified" under the ADA if he or she can perform the essential functions of a position held or desired. *Smith v. Midland Brake*, 180 F.3d 1154, 1159 (10th Cir. 1999). Hence, once a disabled individual requests reassignment as an accommodation, the employer must make a reasonable accommodation of that request. *Id.*

Implementation of the reasonable accommodation aspect of the ADA is an interactive process that requires participation by both parties. *Templeton v. Neodata Services, Inc.*, 162 F.3d 617, 619 (10th Cir. 1998). The interactive process begins with the employee providing enough information about his limitations and desires to convey the employee's desire to remain with the employer despite his disability and limitations. *Midland Brake,* 180 F.3d at 1172. To trigger the interactive process, no magic words are necessary. *Id.* "To request accommodation, an individual may use 'plain English' and need not mention the ADA or use the phrase 'reasonable accommodation.' *Id.*

Mr. Ward triggered the interactive process repeatedly. He first raised the issue of his disability and specifically requested reassignment or job restructuring in May 2003. Then, in September 2003, he provided the doctor's report containing his permanent restrictions, and reiterated his request for reassignment or job restructuring. Mr. Ward's communications with Respondent exceeded the minimum legal requirement for triggering the interactive process; he provided Respondent with an overview of his employment and educational history, and he made specific suggestions for reassignment positions at DNR, and how to restructure his job.

"The interactive process includes good-faith communications between the employer and employee." *Midland Brake*, 180 F.3d at 1172 – 73. After receiving notice from Mr. Ward of his disability and his desire for an accommodation, Respondent had no communication with Ward about reassignment, vacant jobs, or his qualifications. Respondent is a statewide agency with over 1500 classified positions. Complainant informed Respondent he was willing to relocate anywhere in the state to continue working for the Department.

Respondent breached its duty to engage with Complainant in a good faith effort to "identify the precise limitations resulting from the disability and potential reasonable accommodations that could overcome those limitations." *Bartee v. Michelin North America, Inc.*, 374 F.3d 906, 916 (10th Cir. 2004). In fact, Respondent failed even to identify its ADA Coordinator to Complainant.

"A party that obstructs or delays the interactive process is not acting in good faith. A party that fails to communicate, by way of initiation or response, may also be acting in bad

faith." *Id*, citing *Baert v. Euclid Beverage, Ltd.*, 149 F.3d 626, 634 (7th Cir. 1996). Respondent's complete silence for a six-month period, its failure to communicate with Complainant at all, Ms. Elswick's failure to disclose her role as ADA Coordinator to Complainant, and her failure to lead Complainant through any portion of the interactive process, constitute bad faith failure to engage in the interactive process. Parties may not cause a breakdown in the interactive process for the purpose of either avoiding or inflicting liability. *Id.*; *see also, Smith v. Midland Brake, 180 F.3d at 1178 – 1179.*

In addition to Respondent's failure to engage in the interactive process, it breached its duty to reasonably accommodate Complainant by failing to timely conduct a vacant job search. As noted above, under the ADA, a reasonable accommodation may include a reassignment from an employee's current job to one that he desires and for which he is qualified. *Midland Brake*, 180 F.3d at 1161. Once an employer determines that the employee can no longer perform the essential functions of his or her position with or without reasonable accommodation, the employer is required under the ADA to consider reassignment. *Id.*, 180 F.3d at 1171. Such was the case herein.

In September 2003, Elswick and Capwell determined that Complainant could no longer perform the essential functions of the Wildlife Technician III position with or without accommodation. Once they had made that decision, the ADA required that they consider reassignment as an alternate reasonable accommodation of Complainant. *Id.*

Under *Midland Brake*, *supra*, the employer is required to take reasonable steps to accomplish a reassignment. The duty of reassignment requires that the employer "need only take such actions for reassignment as are reasonable under the circumstances." *Id.* Reasonable actions for reassignment in the instant action required at a minimum that Respondent engage in a vacant job search for current or soon-to-be-vacant positions, as required by its own Return to Work/Modified Duty Policy, in September 2003 and for the duration of Complainant's time exhausting FMLA and disability leave. Instead, Respondent did nothing.

To wait six months to conduct a vacant job search, and to advise an employee it has been conducted in the termination letter, is unreasonable, and does not comport with the good faith requirements set forth in *Midland Brake, supra,* and other cases cited above. It is reasonable for Complainant to know the types of jobs utilized in the vacant job search, and to be involved in assisting the employer in utilizing appropriate information to conduct such a search. Respondent violated the ADA in failing to reasonably accommodate Complainant's request for reassignment.

iii. Application of *Community Hospital v. Fail*, 969 P.2d 667 (Colo. 1998), on remand.

On June 22, 2006, the Board remanded this case to the ALJ "solely for legal analysis regarding the fifth prong of the test for a *prima facie* case of discrimination

based on a disability, as enunciated in *Community Hospital v. Fail*, 969 P.2d 667 (Colo. 1998)."

In *Community Hospital v. Fail*, 969 P.2d 667 (Colo. 1998), the Colorado Supreme Court held the following: "We adopt the following test for when an employee seeks to establish that her employer violated the ADA by failing to offer reasonable accommodation. As part of her prima facie case, the employee must show: (1) that she is a disabled person within the meaning of the ADA; (2) that she was otherwise qualified for her current positions; (3) that she was terminated from that position because of her disability; (4) that she requested reasonable accommodation either within her current position or through transfer to a vacant position for which she was qualified; and (5) that, despite her request for reasonable accommodation by transfer to a vacant position, the employer continued to seek applicants for the vacant position or hired persons who possessed the disabled employee's qualifications." *Fail*, 969 P.2d at 672.

Complainant has met his burden of proving the fifth prong of the *Fails prima facie* case. The preponderance of evidence demonstrates that despite Complainant's request for reasonable accommodation by transfer to a vacant position, Respondent continued to seek applicants other than Complainant, for any and all vacant positions for which he was qualified.

Respondent asserts that Complainant has not met his burden of proof under *Fail*, because he produced no evidence at hearing concerning specific vacant jobs for which he was qualified. Respondent's argument overlooks its own Return to Work policy, however, which placed the legal burden squarely on Respondent's Human Resources Office to "make a search for vacant positions within the Department, for which the employee is qualified, and which do not exceed the employee's permanent restrictions." Moreover, Respondent's HR Director promised Complainant in a May 13, 2004 letter that it would conduct the search pursuant to that policy.

When a state agency codifies in its official policy that it assumes the duty to perform the vacant job search, that agency's employee need not demonstrate what the specific vacant jobs were, in order to satisfy the fifth prong of *Fail*. To meet that fifth prong under the circumstances herein, the employee must demonstrate that the agency had a policy requiring it to conduct the vacant job search, the employee requested transfer to a vacant position, the agency failed to conduct that job search in violation of its own policy, and the agency failed to consider that employee for any and all vacant positions that came open.

Any alternate application of the fifth prong in *Fail* herein would defeat the Colorado Supreme Court's overarching goal in *Fail* of reaching the appropriate

balance between the employee's burden of going forward on a failure to accommodate claim, and the employer's burden of demonstrating undue hardship. *Fail*, 699 P.2d at 673-4. In discussing the "risk of blurring the distinction between reasonable accommodation and undue hardship," the Court focused primarily on the issue of reasonableness, stating, "an employee must show that his suggested method of accommodation is reasonable 'in the run of cases.' . . The phrase 'in the run of cases' requires a showing that a typical employer in the industry would be able to make the accommodation." *Fail*, 969 P.2d at 674. Applying this standard governing the fifth prong of *Fail* to the facts at bar, a typical employer that has a policy requiring it to conduct the vacant job search "would be able to make the accommodation" of conducting that vacant job search in every case. It is reasonable to expect a state agency to comply with its own policy. Therefore, Complainant has met the fifth prong in *Fail*.

The above discussion is consistent with the Colorado Supreme Court's treatment of the hospital's transfer policy in *Fail*. The Court warned, "To require her [Fail] to provide additional evidence of Community's ability to hire her in the vacant positions goes too far because it blurs the distinction between reasonable accommodation and undue hardship. For example, to require Fail to prove that Community could have waived its transfer policy would shift the burden of proving the affirmative defense of undue hardship to Fail and away from Community." *Id.* Similarly herein, to require Ward to perform a vacant job search, excusing Respondent from compliance with his own policy, in order to meet his *prima facie* case, would shift the burden of proving the affirmative defense of undue hardship away from Respondent and onto Ward.

The evidence is undisputed that despite Complainant's request for transfer to a vacant position, Respondent, in violation of its own policy, failed to consider Complainant as a candidate for any and all vacant positions in the 1500-employee statewide agency, for a period of over five months. These facts meet the fifth prong of the *pfc* in *Fail*. Respondent is equitably estopped by its own policy from asserting that Complainant must produce evidence of specific vacant jobs, and Complainant is entitled to a judgment he has established the fifth element of the *prima facie* case in *Fail*.

For the reasons set forth above, Complainant has met the fifth prong of the prima facie case for a failure to accommodate claim under *Fail*.

iv. Complainant is unable to perform the essential functions of the Wildlife Technician III position with or without accommodation.

Complainant bears the burden of showing he is able to perform the essential functions of his position. *Mason v. Avaya Communications, Inc.*, 357 F.2d 1114, 1119 (10th Cir. 2004). Essential functions are "the fundamental job duties of the employment position

the individual with a disability holds or desires." 29 C.F.R. §1630.2(n)(1); *Mason*, 357 F.3d at 1119. Evidence considered in determining whether a particular function is essential includes: (1) the employer's judgment as to which functions are essential; (2) written job descriptions prepared before advertising or interviewing applicants for the job; (3) the amount of time spent on the job performing the function; (4) the consequences of not requiring the incumbent to perform the function; and (5) the work experience of past incumbents in the job." *Id.*; 29 C.F.R. §1630.2(n)(3).

The ADA requires that courts consider "the employer's judgment as to what functions of a job are essential." *Mason*, 357 F.3d at 1119; 42 U.S.C. §12111(8). Courts "will not second guess the employer's judgment when its description is job-related, uniformly enforced, and consistent with business necessity." *Mason*, 357 F.3d at 1119.

"The question of whether a job requirement is a necessary requisite to employment initially focuses on whether an employer actually requires all employees in the particular position to satisfy the alleged job-related requirement." *Davidson v. America Online, Inc.*, 337 F.3d 1179, 1191 (10th Cir. 2003). If the employer does require performance of those functions, "the inquiry will then center around whether removing the function would fundamentally alter the position." *Id.* This inquiry is not intended to second-guess the employer or to require him to lower company standards. *Id.*

Complainant asserts that the essential functions of the Technician III position should be limited to the hatchery building post, the isolation unit, and various other light duty assignments he can perform, including lab work and supervision of inmates and volunteers. Complainant concedes he is unable to perform the work in the nurse basins and the raceway under his permanent restrictions.

In support of his position, Complainant cites the fact that Respondent assigned Cindy Reagan to the hatchery building for a six-year period, at roughly 85% of her time, and has permitted several employees, including Complainant, to perform hatchery building duties as a light duty assignment on a prolonged basis.

Respondent counters that the Wildlife Technician III Position Description Questionnaire (PDQ) and work experience of Technician III's establish that the essential functions of the position include all of the work at the Hatchery, including the nurse basin and raceway posts, driving, operation of heavy machinery, and other medium and heavy duty assignments, not just the lighter posts.

Where, as here, the actual scope of the position encompasses a wide range of duties, requiring a multitude of tasks in several environments, the ADA does not mandate a narrowing of the essential functions of the position to one task or assignment. *Martin v. Kansas*, 190 F.3d 1120, 1130-31 (10th Cir. 1999) and *Anderson v. Coors Brewing Co.*, 181 F.3d 1171, 1176 (10th Cir. 1999). In *Anderson*, an employee was hired to work as a temporary production operator, working at a variety of locations throughout the brewery on

a wide variety of physically challenging tasks, on an as needed basis. During the course of her employment, the employee worked on the loading docks performing several manual tasks, and as a can sorter. After receiving permanent restrictions that precluded her from performing most of the manual tasks of a production operator, Complainant sought an accommodation to work exclusively as a can sorter, sitting on a stool.

Anderson asked the court as a matter of law to define the essential functions of her position as only the can sorting tasks. The Tenth Circuit affirmed the trial court's denial of that request, noting, "In many situations, an employer may create a position, the nature of which, requires an employee to perform a multitude of tasks in a wide range of environments. . . . The record clearly demonstrates that the TPO position is a multiple duty job classification which serves a legitimate business purpose. . . The TPO position allows Defendant to rotate workers on an as needed basis to different parts of its operation . . . . " *Anderson*, 181 F.3d at 1177.

The legitimate business needs of the Hatchery, the position description, and the actual history of employee performance in the Technician III position, establish the essential functions of the Technician III position as being very broad. The position requires that its incumbent perform an enormous variety of tasks, in a wide range of environments, on an as-needed basis. In addition, significantly, the position functions in an isolated outpost as part of a small, specialized team of six Wildlife Tech III's. The Tech III position cannot be limited in scope to exclude performance of the nurse basin, raceway, and driving components of the job. To do so would impose an undue burden on the Hatchery.

Having determined that Complainant could not perform the essential functions of the Tech III position, the next inquiry is whether he could have done so with reasonable accommodation. Once again, Complainant concedes that he was unable to perform the heavy portions of the job, including operation of heavy machinery, feeding and cleaning in the nurse basin and the raceway, and driving. Complainant requests as a reasonable accommodation that Respondent transform the position from one which requires a myriad of tasks, to one which requires him to work exclusively in the hatchery, isolation unit, and on other light duty tasks. Complainant relies on the CCRC regulation and other authorities which list "job restructuring" as a possible reasonable accommodation. CCRC Rule 60.2(B)(2).

Complainant's request must be rejected because it fundamentally alters the nature of the position. Respondent is not obligated under the ADA to create a new position for Complainant or to eliminate essential functions of the position as an accommodation. *Id.; Smith v. Midland Brake, 180 F.3d at 1170.* Therefore, the requested accommodation is not reasonable. Complainant was unable to perform the essential functions of the Tech III with reasonable accommodation.

Even assuming, arguendo, that performance of hatchery duties, isolation unit, and other light duties were a reasonable accommodation, Complainant has not proven that he could perform these essential functions within his permanent restrictions. Specifically,

Complainant is unable to independently transport the fish food from the storage area to the hatchery, is unable to drive, and is unable to perform the feeding duties within his lifting and carrying restrictions, while meeting his walking restriction.

B. Respondent violated its own Return to Work/Modified Duty Policy and Board Rules R-9-5 and R-8-31.

State Personnel Board Rule R-9-5(A)[1], 4 CCR 801, states,

> "Each agency will notify applicants and employees of the name, business address, and telephone number of the ADA coordinator. Appointing authorities and employees should consult with their departmental ADA coordinator concerning what constitutes a disability, reasonable accommodation, and undue hardship." 4 CCR 801.

Ms. Elswick had the most contact with Mr. Ward throughout 2003 and 2004. At all times relevant, she was the Department's ADA Coordinator, and the expert in State Personnel Board Rules governing disability laws. As ADA Coordinator and acting HR Director, it was Ms. Elswick's duty under R-9-5(A) to identify herself as ADA coordinator and to assure that she, along with Complainant and Capwell, consulted regarding whether Mr. Ward's condition constituted a disability, reasonable accommodations were available to him, and whether such accommodations would pose an undue hardship on DNR. She neither performed this function herself nor delegated it to another staff person in her office.

Incredibly, Ms. Elswick never disclosed her role as ADA Coordinator to Mr. Ward. In addition, she misled Mr. Ward in her pre-termination letter to him, omitting the relevant portion of Director's Procedure P-5-10 that concerned qualified persons with a disability. (See Findings of Fact #58 - 61).

Ms. Elswick's actions in this case constitute a flagrant violation of the very rules she was responsible for enforcing throughout the Department. Respondent was unable to account for this conduct at hearing.

DNR's own Return to Work/Modified Duty Policy, written by Elswick in 1999, requires the same process as that contemplated by Board Rule R-9-5(A). It mandates that once permanent work restrictions are in place, the ADA Coordinator and HR Director identify whether the employee can perform the essential functions of the position with or without reasonable accommodation, and then address whether the employee is protected under the ADA.

The Modified Duty Policy also mandates, "The Human Resources Office will make a search for vacant positions within the Department, for which the employee is qualified, and

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1 This rule and all Board rules cited herein were in effect at the time of the events under review. In July 2005, the Board rules were amended.

which do not exceed the employee's permanent restrictions." Under this policy, it is after the search for vacant positions that the employee may apply for disability benefits.

Respondent violated the policy by tracking Mr. Ward directly into disability programs prior to conducting the "search" for vacant positions. In her May 2003 letter to Ward, Ms. Elswick informed him that upon receipt of his permanent restrictions, the vacant job search required by the Policy would be performed. As the author of the Modified Duty Policy, Ms. Elswick knew she was required to conduct that vacant job search immediately upon receipt of Mr. Ward's permanent restrictions and request for reassignment.

Upon actual receipt of Mr. Ward's permanent restrictions, Ms. Elswick did nothing. Instead, she waited six months, until sending Mr. Ward his termination letter, to advise him that a search had been conducted, and gave him no information about the search, the jobs identified or considered, and the basis for rejection. Ms. Elswick knowingly violated the policy she authored and was responsible for enforcing, Department-wide.

Board Rule R-8-31 requires, "Any time an appointing authority is aware of an allegation of discrimination based on disability, the matter must be referred to the agency's ADA coordinator for investigation, no later than 7 days from the date of the allegation. . . . Any time limits are suspended pending the investigation." Ms. Elswick acted on Mr. Kolecki's behalf in handling Mr. Ward's termination. Under this rule, upon receipt of Mr. Ward's letters in September 2003 and March 2004, prior to termination, she was obligated, as ADA coordinator, to investigate Mr. Ward's claim of discrimination. Instead of investigating the claim, she did nothing.

C. Respondent's action was arbitrary and capricious

In Colorado, arbitrary and capricious agency action is defined as:

> (a) neglecting or refusing to use reasonable diligence and care to procure such evidence as it is by law authorized to consider in exercising the discretion vested in it; (b) failing to give candid and honest consideration of evidence before it on which it is authorized to act in exercising its discretion; or (c) exercising its discretion in such manner after a consideration of evidence before it as clearly to indicate that its action is based on conclusions from the evidence such that reasonable men fairly and honestly considering the evidence must reach contrary conclusions.

Lawley v. Dep't of Higher Education, 36 P.3d 1239, 1252 (Colo. 2001).

Respondent's failure to communicate with Complainant after his requests for accommodation, and its knowing violation of its own Return to Work/Modified Duty policy, constitute arbitrary and capricious agency action under *Lawley*. Respondent ignored three letters from Complainant requesting an accommodation. It ignored its obligation to conduct

a vacant job search upon receipt of his September 24, 2003 letter. Lastly, it ignored Complainant's last letter, sent after pre-termination communication, noting DNR's pattern of silence and stating that he was being treated as an "expendable item." No reasonable decision maker would terminate an eleven-year employee injured on the job under such circumstances.

D. Attorney fees are warranted in this action.

Attorney fees are warranted if an action was instituted frivolously, in bad faith, maliciously, or as a means of harassment or was otherwise groundless. § 24-50-125.5, C.R.S. and Board Rule R-8-38, 4 CCR 801. Board Rule R-8-38(A)(2) states that a personnel action is made in bad faith, was malicious, or was used as a means of harassment if "it is found that [it] was pursued to annoy or harass, was made to be abusive, was stubbornly litigious, or was disrespectful of the truth."

"A party that obstructs or delays the interactive process is not acting in good faith. A party that fails to communicate, by way of initiation or response, may also be acting in bad faith." *Bartee v. Michelin North America, Inc.*, 374 F.3d 906, 916 (10th Cir. 2004), citing *Baert v. Euclid Beverage, Ltd.*, 149 F.3d 626, 634 (7th Cir. 1996). Respondent was silent for a six-month period until it terminated Complainant.

Respondent engaged in a pattern of bad faith in this case. It started with Ms. Elswick concealing her role as ADA Coordinator for DNR from Mr. Ward. It continued through her failure to advise Mr. Ward of his rights and the agency's responsibilities under the ADA, and her continuing failure to engage in the interactive process or to conduct a vacant job search as required under DNR policy. It culminated in Ms. Elswick's pre-termination letter to Complainant, in which she omitted the relevant portion of the rule setting forth the applicable ADA standards that directly applied to his situation. Rarely does an agency representative engage in such intentional misleading of an employee.

CONCLUSIONS OF LAW

1. Respondent's action was arbitrary, capricious, or contrary to rule or law;

2. Respondent discriminated against Complainant on the basis of disability;

3. Complainant is entitled to an award of attorney fees and costs.

ORDER

Respondent's action is **rescinded**. Complainant is reinstated with full back pay and benefits to the date of termination. Because Complainant was not able to perform the essential functions of his position with or without reasonable accommodation at the time of his termination from DNR, Respondent and Complainant are ordered to engage in the

interactive process of reasonably accommodating Complainant in a vacant position. Such process shall take place for a six-month period during which time Complainant shall continue to receive front pay consisting of his full pay and benefits. Respondent shall pay Complainant's reasonable attorney fees and costs incurred in this action.

Dated this 20th day of July, 2006.

Mary S. McClatchey
Administrative Law Judge
633 17th Street, Suite 1320
Denver, CO 80203

CERTIFICATE OF MAILING

This is to certify that on the 24th day of February 2006, I placed true copies of the foregoing **INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE, ON REMAND and NOTICE OF APPEAL RIGHTS** in the United States mail, postage prepaid, addressed as follows:

Patricia L. Cookson, Esquire
843 Rood Avenue
Grand Junction, Colorado 81501

and in the interagency mail, to:

Chris Puckett
Assistant Attorney General
Employment Law Section
1525 Sherman Street, 7th Floor
Denver, Colorado 80203

NOTICE OF APPEAL RIGHTS

EACH PARTY HAS THE FOLLOWING RIGHTS

1. To abide by the decision of the Administrative Law Judge ("ALJ").
2. To appeal the decision of the ALJ to the State Personnel Board ("Board"). To appeal the decision of the ALJ, a party must file a designation of record with the Board within twenty (20) calendar days of the date the decision of the ALJ is mailed to the parties. Section 24-4-105(15), C.R.S. Additionally, a written notice of appeal must be filed with the State Personnel Board within thirty (30) calendar days after the decision of the ALJ is mailed to the parties. Both the designation of record and the notice of appeal must be received by the Board no later than the applicable twenty (20) or thirty (30) calendar day deadline. Vendetti v. University of Southern Colorado, 793 P.2d 657 (Colo. App. 1990); Sections 24-4-105(14) and (15), C.R.S.); Board Rule 8-68, 4 CCR 801.
3. The parties are hereby advised that this constitutes the Board's motion, pursuant to Section 24-4-105(14)(a)(II), C.R.S., to review this Initial Decision regardless of whether the parties file exceptions.

RECORD ON APPEAL

The cost to prepare the record on appeal in this case is $50.00. This amount does not include the cost of a transcript, which must be paid by the party that files the appeal. That party may pay the preparation fee either by check or, in the case of a governmental entity, documentary proof that actual payment already has been made to the Board through COFRS. A party that is financially unable to pay the preparation fee may file a motion for waiver of the fee. That motion must include information showing that the party is indigent or explaining why the party is financially unable to pay the fee.

Any party wishing to have a transcript made part of the record is responsible for having the transcript prepared. Board Rule 8-69, 4 CCR 801. To be certified as part of the record, an original transcript must be prepared by a disinterested, recognized transcriber and filed with the Board within 59 days of the date of the designation of record. For additional information contact the State Personnel Board office at (303) 866-3300.

BRIEFS ON APPEAL

The opening brief of the appellant must be filed with the Board and mailed to the appellee within twenty calendar days after the date the Certificate of Record of Hearing Proceedings is mailed to the parties by the Board. The answer brief of the appellee must be filed with the Board and mailed to the appellant within 10 calendar days after the appellee receives the appellant's opening brief. An appellant may file a reply brief within five days. Board Rule 8-72, 4 CCR 801. An original and 8 copies of each brief must be filed with the Board. A brief cannot exceed 10 pages in length unless the Board orders otherwise. Briefs must be double-spaced and on 8 1/2 inch by 11 inch paper only. Board Rule 8-73, 4 CCR 801.

ORAL ARGUMENT ON APPEAL

A request for oral argument must be filed with the Board on or before the date a party's brief is due. Board Rule 8-75, 4 CCR 801. Requests for oral argument are seldom granted.

PETITION FOR RECONSIDERATION

A petition for reconsideration of the decision of the ALJ must be filed within 5 calendar days after receipt of the decision of the ALJ. The petition for reconsideration must allege an oversight or misapprehension by the ALJ. The filing of a petition for reconsideration does not extend the thirty-calendar day deadline, described above, for filing a notice of appeal of the ALJ's decision. Board Rule 8-65, 4 CCR 801.